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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THOMAS I. MAHON, Plaintiff and Appellant, v. COUNTY OF SAN MATEO, ET AL, Defendants and Respondents.	A149633 (San Mateo County Super. Ct. No. CIV446698)

Thomas I. Mahon (appellant) appeals from a judgment entered in favor of the County of San Mateo (County) and the San Mateo County Board of Supervisors (Board) on his action for inverse condemnation. His claim was predicated on delays in issuing design review permits for two homes he proposed to construct in a residential neighborhood. We affirm.

I. BACKGROUND

Developers in the coastal zone of San Mateo County must comply not only with the general plan and objective zoning requirements such as floor area ratios, setbacks and minimum lot size, but also with the discretionary design review requirements set forth in Chapter 28.1 of the San Mateo County Zoning Regulations. Design review regulates the subjective aesthetics of a structure, and approval of a design must be obtained before a building permit will issue. Neighbors living within 300 feet of a proposed project must be given notice by mail of proposed project, followed by a comment period to enable public input.

Under the design review ordinance applicable to this case, the Design Review Administrator or a designee (usually the planner assigned to the project) was responsible for making a decision on a design review permit application. Decisions on a design review application were appealable to the Planning Commission and ultimately the Board.

Appellant was the owner of what he believed to be four contiguous 2,500-square-foot lots on Second Street in Montara, an unincorporated area located in the mid-coast zone of San Mateo County. In February 1999, he applied for design review permits to construct two adjacent single family homes on this land, and the projects were assigned reference numbers PLN-1999-00015 and PLN 1999-00215. Planning staff conditionally approved the design permits in March and April 1999, and in July 1999, while final design approval was pending, appellant applied for two building permits.

In October 1999, before a decision had been made regarding the building permits, Planning staff concluded the neighboring property owners had not been given proper notice by mail of the design permit applications. Staff rescinded the conditional approval of the design permits to allow public comment, and notices were mailed to neighboring property owners on October 22, 1999.

After the notices were mailed, the Planning Department received many written objections from members of the public and the Mid-Coast Community Council (MCCC), a local elected community advisory board. In general, the objectors complained that the proposed homes were visually bulky and too large in scale given the existing character of the community. On December 31, 1999, the assigned County planner, Lily Toy, sent a letter to appellant pointing out aspects of the design which were inconsistent with the applicable design standards, and requesting that appellant either address the issues identified or request a decision by staff. Appellant did not request a staff decision, but submitted revisions to his plans for one of the homes (PLN 1999-00215).

On October 10, 2000, Planning staff issued a conditional approval of the home for which revised plans had been submitted (PLN 1999-00215). Appellant also received approval for the merger of the properties (then thought to be four 2,500 square foot lots)

into two 5,000 square foot lots. Several members of the community appealed the design approval to the Planning Commission, and in January 2001, after holding a public hearing, the Planning Commission reversed the conditional approval granted by Planning staff. Appellant appealed to the Board, which affirmed the decision of the Planning Commission in August 2001. On October 13, 2001, the Board remanded the matter to allow appellant to address the inadequacies of his design. Appellant did not challenge this decision by the Board.

Appellant submitted revised plans for one of the homes (PLN 1999-00215). On June 19, 2002, Toy advised him by letter that while the changes were "a step towards the appropriate direction to address the issues of scale and character," the modifications were still "minimal" and staff could not support the project as proposed. Toy gave appellant the option of either submitting additional plan revisions or moving forward with the submitted design by forwarding the plans to MCCC for review and comment and then submitting them to the Planning Commission for review after a public hearing. Appellant submitted revised plans on September 9, 2002. By that time another planner had been assigned because Toy had left the County.

In February 2004, appellant's attorney sent a letter to the County stating the designs had been deemed approved under the Permit Streamlining Act (PSA; Govt. Code, § 65950 et seq.). Under this theory, appellant claimed the plans became approved as a matter of law when the County failed to approve or disapprove them within 60 days of either October 13, 2001, when the permit application was remanded to the Planning Commission, or September 9, 2002, when appellant submitted his last set of revised plans. The County disagreed.

In April 2004, the Planning Commission again denied the design permit for PLN 1999-00215. Staff recommended the approval of the design permit for PLN 1999-00015, but community members appealed and the Planning Commission denied the permit on November 11, 2004. Appellant appealed to the Board, which held public hearings on February 8, 2005, after which it affirmed the Planning Commission decisions denying the design permits.

Meanwhile, in June 2004, appellant filed a complaint for declaratory relief seeking a judicial determination that his design review permit applications had been deemed approved under the PSA. (Case no. 440096.) County prevailed in a motion for summary judgment and this court affirmed. (*Mahon v. County of San Mateo* (2006) 139 Cal.App.4th 812.)

On May 6, 2005, appellant filed the instant action, consisting of a petition for writ of administrative mandate and complaint seeking injunctive relief, declaratory relief and damages based on inverse condemnation and the denial of his civil rights. (Case No. 446698.) In June 2008, the superior court partially granted the writ petition, which had been bifurcated from the remainder of the action, and ordered the Board to rehear appellant's appeals and hold a "fair and proper" hearing. The court found that appellant had not received a fair hearing before the Board, because he was not given sufficient time to address the objections of those who opposed the design of the proposes homes, and one of the members of the Board had become personally involved in the underlying permit application process. It rejected appellant's argument that he was entitled to have the original designs approved as a matter of right.

The Board held new hearings in March and April 2009, and allowed appellant additional time to correct certain design deficiencies. While this process was underway, a community group called Montara Neighbors for Responsible Building asserted that under recent case law interpreting the state's subdivision requirements, the 10,000 square feet of property owned by appellant was a single lot that had never been lawfully subdivided, rather than two 5,000 square foot lots. (See *Abernathy Valley v. County of Solano* (2009) 173 Cal.App.4th 42 (*Abernathy*); *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543 (*Witt Home*).) Because the zoning in the area allowed only one home to be built on each parcel, this would mean appellant could build only one of the two proposed homes.

The matter was ultimately heard by the Board on May 19, 2009, at which time it denied the design review permits on the ground that appellant had not demonstrated he owned two lots. In August 2009, appellant filed a complaint for declaratory relief and

petition for writ of mandate (Case no. 486981) arguing the Board had been incorrect to apply the new case law to his property and should have ruled on the merits of his design proposals without regard to the dispute over the number of lots he owned. That case was consolidated with case no. 446698.

In September 2010, the superior court partially granted the writ in case number 486981 and directed the Board to grant or deny the design permits based solely on the merits of the design plans. Consistent with this order, the Board approved appellant's revised designs in December 2010, and conditioned the issuance of design permits on his demonstrating that his property consisted of two 5,000 square foot lots.

On June 15, 2011, the superior court held a trial on the cause of action for declaratory relief in case number 486981 to determine the number of lots owned by appellant. It determined that appellant's property had not yet been lawfully subdivided, and that he owned only one 10,000-square-foot parcel.

In April 2013, the trial court granted the County's motion for summary adjudication of the remaining claims in appellant's complaint in case number 446698, with the exception of his inverse condemnation claim under state law. A court trial on the liability phase of the inverse condemnation claim commenced in April 2014.

On August 12, 2016, the trial court filed a statement of decision finding that appellant had failed to demonstrate a taking or inverse condemnation of his property, whether temporary or otherwise. The court noted that while appellant had been treated unfairly and denied due process in the processing of his design review permit, it had previously granted a writ requiring a new hearing and appellant had received the process to which he was due. The County's decision in 1999 to restart the design review procedure to give notice to the neighbors had been affirmed in a decision by the court of appeal and could not be a basis for inverse condemnation liability, and appellant had elected to submit revised plans that did not substantially reduce the scale of the homes. "[Appellant] had the absolute right to stand his moral ground and fight to obtain the necessary permits to build the large [scale] houses he sought. But that was a business decision on his part. [Appellant] points to years of delay in the process, presents

evidence of his efforts to make design changes to satisfy the concerns voiced by the staff of the Planning Commission, and evidence of the inconsistent and ever-shifting demands by the County. Yet, the evidence as a whole reflects that the design changes that [appellant] was willing to make were more in the nature of tweaks and shifts and aesthetic looks (such as height, roof slope, garage location), but were not a significant diminution of the large scale home proposed."

A final judgment issued on December 16, 2016. In this appeal, appellant argues that the trial court should have found in his favor on the inverse condemnation claim because the delays by the County in issuing the design review permits deprived him of his property without just compensation.[1]

II. STANDARD OF REVIEW

Whether the County's actions constituted a taking of appellant's property is a mixed question of law and fact. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 260; *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250.) We review the trial court's determination of the historical facts for substantial evidence and consider de novo the selection of the relevant legal principles and their application to the historical facts. (*Ibid*.)

III. DISCUSSION

A. *General Principles*

The state and federal Constitutions guarantee real property owners "just compensation" when their land is taken for a public use, and a cause of action for inverse condemnation may be asserted when a public entity has circumvented this requirement. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.; *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537 (*Lingle*); *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773; *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 377.)

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[1] Although appellant filed his notice of appeal from the statement of decision, we treat the premature notice as having been timely filed immediately after the final judgment was rendered. (Cal. Rules of Court, rule 8.104(d)(2); *Conservatorship of Edde* (2009) 173 Cal.App.4th 883, 889.)

Though "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," in certain cases a government regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." (*Lingle*, *supra*, 544 U.S. at p. 537.) Even a temporary taking "may require payment of just compensation for the period the taking was in effect." (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 184 (*Lockaway*); see *First English Evangelical Lutheran Church of Glendale v. County of Los Angles* (1987) 482 U.S. 304, 321.)

Supreme Court precedents have recognized two categories of governmental action that generally will be deemed per se takings: (1) where government requires an owner to suffer a " 'permanent physical invasion' " of his property, even a minor one; and (2) where a regulation "completely deprives an owner of 'all economically beneficial use' of her property." (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270 (*Allegretti*).) For regulatory taking claims that do not fall within these two categories, courts will generally apply the guidelines set forth in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*). (*Ibid*; see also *Lingle*, *supra*, 544 U.S. at p. 538; *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 264 (*Surfrider*).)

Under *Penn* Central, "[t]here is no set formula, but ' "several factors . . . have particular significance." [Citation.] Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." [Citation.] In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. [Citation.].' " (*Allegretti*, *supra*, 138 Cal.App.4th at pp. 1270–1271.) Each of these factors "aims to 'identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his

domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.' " (*Id*. at p. 1271.)[2]

B. *Ripeness*

County asserts, as a threshold matter, that appellant's claims are not ripe because there has been no final decision regarding the scope of the development that will be allowed on his property. We agree.[3]

"A takings claim that challenges the application of regulations to particular property is not ripe until 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' " (*Surfrider*, *supra*, 14 Cal.App.5th at p. 256.) "Such a final decision 'informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, [citation], or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, [citation]. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question.' " (*Ibid*, citing *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618.)

Here, the regulation at issue is the application of the design review ordinance to two homes appellant intended to build on his Second Street property. When appellant filed his complaint in 2005, no final decision had yet been made as to the designs that

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[2] In *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1021, the court held that when a land use regulation is "part of a reasonable regulatory process designed to advance legitimate government interests," it is not a compensable taking unless it deprives the property of all value. In *Lockaway*, *supra*, 216 Cal.App.4th at page 189, the court noted that this " 'stand-alone regulatory takings test' " was no longer viable in light of the United States Supreme Court's decision in *Lingle*, *supra*, 544 U.S. at p. 545. We apply the *Penn Central* analysis rather than the test set forth in *Landgate*, and need not address the extent to which *Landgate* remains good law.

[3] Although the trial court did not rely on ripeness as a basis for its decision and it is unclear whether the claim was raised below, a jurisdictional issue such as ripeness may be raised for the first time on appeal. (See *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 501, fn. 5.) The County has asserted in its respondent's brief that the inverse condemnation claim is not ripe, and appellant has not filed a reply brief or otherwise addressed the contention.

would be approved. The Board ultimately approved the design of two homes in 2010, but when it did so the courts had not yet determined the separate issue of whether appellant's property consisted of two 5,000 square foot lots (on which the two homes could be constructed) rather than a single 10,000 square foot lot (on which only one home could be constructed). The design approval was therefore contingent on appellant establishing that the property consisted of two lots. The superior court subsequently ruled that the property consisted of only one lot; that decision appears to be final; and there is no evidence the lot has since been successfully subdivided into two lots.

While the design of two homes has now been conditionally approved, no building permit has issued and it appears it will be impossible for appellant to build two homes unless he subdivides his lot or obtains other variances or approvals. Absent a showing that appellant owns two lots on which it would be legally permissible to build two homes, we cannot definitively resolve the extent to which the delays in issuing the design permits for two homes might have defeated appellant's " 'reasonable investment-backed expectations.' " (*Surfrider*, *supra*, 14 Cal.App.5th at p. 256.) Because we do not yet know the extent of the permitted development of the land in question, the inverse condemnation claim is not ripe.

C. *The Delays in the Permit Process Did Not Effect a Taking*

Assuming appellant's claim for inverse condemnation is ripe and may be considered on the merits, we conclude there was no compensable temporary taking under *Penn Central*.[4]

Preliminarily, we consider the scope of appellant's claim. The cause of action for inverse condemnation was a part of the petition for writ of mandate and complaint in case number 446698, filed on May 6, 2005. It contained no allegations concerning the County's actions after February 2005, when the Board issued its second decision denying

[4] Appellant makes no argument the delays in permitting process amounted to a permanent physical invasion of his property or deprived him of all economically beneficial use of his land; hence, there was no per se taking and we look to the *Penn Central* factors. (See *Allegretti*, *supra*, 138 Cal.App.4th at p. 1270.)

approval of the design permits. The complaint and petition for writ of mandate in case number 486981, which was consolidated with case number 446698, did not allege a taking or contain a cause of action for inverse condemnation, but instead concerned the propriety of the County's determination that the property at issue was a single 10,000 square foot lot. Thus, as the trial court correctly noted, only those permit processing delays that occurred in 2005 or earlier may be considered.

We turn now to the merits of the *Penn Central* inquiry, under which courts have typically considered "three primary factors: (1) the 'economic impact' of the regulation on the claimant, (2) the extent to which the regulation interfered with 'distinct, investment-backed expectations,' and (3) the 'character of the governmental action.' " (*Lockaway, supra,* 216 Cal.App.4th at pp. 184–185.) None of these factors persuades us that the pre-2005 delays in issuing the design permits constitute a taking.

As to the first *Penn Central* factor, the economic impact of the regulation, we note that traditional land use regulations imposing minimum setbacks, architectural amenities and other design conditions "have long been held to be valid exercises of [a local government]'s traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property." (*Breneric Associates v. City of Del* Mar (1998) 69 Cal.App.4th 166, 176 (*Breneric*).) "It is settled that a land use regulation results in a confiscatory 'taking' only when the landowner has been deprived of 'substantially all reasonable use of his property.' [Citations.] 'Even a significant diminution in value is insufficient to establish a confiscatory taking.' " (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 911.) Appellant was not deprived of his ability to develop his property, but was instead restricted to building homes of a lesser scale than he envisioned.

Turning next to the second *Penn Central* factor, whether the pre-2005 delays interfered with appellant's "distinct investment-backed expectations" (*Penn Central, supra,* 438 U.S. at p. 124), appellant's reasonable expectation that he could build *some* type of house on his property does not mean he could reasonably expect to build two

homes of the particular size and scale he proposed. Planning staff's conditional approval of appellant's plans in 1999 did not give rise to a vested property right to proceed with that development; " 'government power to regulate land use is so important that no vested right to a particular use arises until the government has approved that specific use.' " (*Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1286 (*Rutherford*).)

The third *Penn Central* factor, which requires us to the consider the "character" of the County's action, does not demonstrate a taking occurred. There was no physical invasion of appellant's property. (See *Lockaway, supra*, 216 Cal.App.4th at p. 186.) Nor did the County interfere with a design that had been previously approved, in which appellant could be said to have a vested property interest. (See *ibid*.; *Rutherford, supra*, 188 Cal.App.3d at p. 1286.)

We reject appellant's contention that *Lockaway, supra*, 216 Cal.App.4th 161, requires a different result. In that case, a conditional use permit issued on undeveloped property and authorized the construction of a storage facility for recreational vehicles and boats. (*Id*. at p. 168.) After meeting with the county zoning administrator to confirm the property could be used for this purpose, Lockaway purchased the property for $800,000. (*Ibid*.) Six months later, the voters enacted Measure D, a growth control initiative, which generally prohibited the development of a storage facility in the area of Lockaway's property, but which explicitly did not apply to existing development rights. (*Id*. at p. 169.) Lockaway spent considerable sums of money proceeding with its development efforts and was assured by the county that it had timely proceeded with development, even though there were delays in processing various building permits. (*Ibid*.) Less than a month before the conditional use permit was set to expire, the county advised Lockaway it would not be extended and Lockaway would not be allowed to proceed with its development. (*Id.* at pp. 169–170.) The county later denied Lockaway's application for a new conditional use permit, citing Measure D. (*Id*. at p. 170.)

Lockaway obtained writ relief and the county issued the permits necessary for the project to go forward. (*Lockaway, supra*, 216 Cal.App.4th at p. 171.) It proceeded to

trial on an inverse condemnation claim that was predicated on the delays caused by the county's erroneous claim that Measure D applied to the project. (*Id.* at p. 173.) The superior court found in favor of Lockaway and the court of appeal affirmed, concluding that under *Penn Central*, a taking had occurred. (*Id.* at pp. 185–187.)

As the trial court noted in its statement of decision, the instant case "is very different from the situation in [*Lockaway*], where a *conditional use permit had already been issued*, and hundreds of thousands of dollars had been spent on development. Further, in [Lockaway] the landowner was given no options of how to proceed to work around the perceived problem." To this we would add that in *Lockaway*, the county made explicit promises to the landowner that its proposed development would be allowed to go forward, then made a " 'showstopping U-turn' " based on the enactment of an initiative measure that did not on its face apply to the project. (*Lockaway*, *supra*, 216 Cal.App.4th at p. 186.) The County's decision in this case to rescind the conditional design approvals in 1999 to allow proper notice to be given to the neighbors do not compare to the conduct of the county in *Lockaway*, even when we consider the subsequent delays in the permitting process.

The trial court aptly summarized the situation as follows: "Although a cavalcade of delays and errors, [appellant] had options, but chose to instead try to get approval of his changes without significant reduction in the size of the project houses. [Appellant] was aware early on that there was strong opposition and political pressure against him building larger homes on his lot(s), but he chose to try and obtain approval through continuous design changes without significant size revisions." To the extent appellant was denied a proper hearing on his proposed changes, the trial court granted writ relief and afforded him an adequate hearing. But the delays attendant to obtaining this relief did not amount to a taking.

Finally, we reject appellant's claim that the classification of his property as a single lot "may" have been a taking, effectuated by the erroneous application of *Abernathy*, *supra*, 173 Cal.App.4th 42 and *Witt Home*, *supra*, 165 Cal.App.4th 543. First, the issue was not raised below and is not properly before us. Second, it does not

appear to be ripe for review because there is no evidence appellant has been denied the right to subdivide his lot and we do not know what development will ultimately be approved—one home or two. (See *Surfrider*, *supra* 14 Cal.App.5th at p. 256.) Finally, appellant's argument was contingent on the outcome of a case then pending before the United States Supreme Court. A decision in that case has now issued and it does not appear to support his assertion that *Witt Home* and *Abernathy* were wrongfully decided. (*Murr v. Wisconsin* (2017) ___ U.S. ____ [137 S.Ct. 1933].)

IV. DISPOSITION

The judgment is affirmed. Costs to respondent, the County.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.